INDIGENOUS POLICE CHIEFS OF ONTARIO

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FIRST NATION POLICE SERVICES DEMAND THEIR DAY IN COURT: CANADA CALLED OUT ON STALL TACTICS

On December 5, 2024, First Nations community leaders and police service representatives gathered in Ottawa to provide an update on the human rights complaint of the Indigenous Police Chiefs of Ontario ("IPCO"). IPCO's complaint, launched in March 2023, challenges Canada's decades of chronic underfunding of First Nations community safety under the First Nations and Inuit Policing Program ("FNIPP").

The human rights complaint, which comes on the heels of court victories by Quebec First Nation police services, focuses on the widespread failings of the national First Nations policing program. In particular, the complaint shows how Canada's **chronic underfunding of community safety, and refusal to honourably negotiate with First Nations, is having a profound effect on the safety of First Nation communities.**

Public Safety Canada ("Canada"), the federal ministry responsible for administering the FNIPP, has responded to the human rights complaint by doing everything possible to **avoid, delay, and adjourn the upcoming three-week Canadian Human Rights Tribunal hearing, which is scheduled for January 6-24, 2025.**

Canada's tactics at the Tribunal include: repeatedly raising the prospect of bringing an adjournment motion without actually doing so; bringing a failed motion to limit the scope of the case; burying the First Nations in requests for documents already in Canada's possession; and, after those tactics failed, **filing a late request to adjourn the hearing, barely one month before the case is scheduled to be heard.**

> "First Nations community safety has suffered for too long – it is time for Canada to be accountable for their actions and let us have our day in Court. Public Safety Canada needs to make good on its promise to First Nations that they deserve the same safety conditions as everyone else in this country."
> **Patsy Corbiere, Tribal Chair, United Chiefs and Councils of Mnidoo Mnising**

> "No more delays. That is what our communities keep telling us, and that is what we keep telling Canada. For too long Canada has been able to evade responsibility for their

actions. They refuse to fund our police services, and they refuse to listen when we tell them about the terrible safety conditions in our communities. This simply cannot continue, and that is why we are again asking Canada to stop relying upon delay tactics."
Anna Betty Achneepineskum, Deputy Grand Chief, Nishnawbe Aski Nation

"Canada is doing everything they can to avoid this hearing, even though it has been scheduled since May this year. Canada's actions, while disappointing, are not surprising. The use of these procedural hurdles to prevent First Nations people from advocating for themselves is just another example of Canada's dishonourable behaviour."
Linda Debassige, Grand Council Chief, Anishinabek Nation

"We need Canada to negotiate honourably and provide our communities with policing equal and equitable to what non-First Nations peoples enjoy today. We will not allow our community of Netmizaaggamig Nishnaabeg Unsurrendered to suffer because of Canada's neglectful treatment. We can no longer afford to wait while lives are lost, and our community lives in fear."
Louis Kwissiwa, Chief, Netmizaaggamig Nishnaabeg Unsurrendered

"As police chief for one of Ontario's nine self-administered First Nation police services, I see firsthand the terrible consequences of Canada's inaction. Our officers and civilian staff are asked to do more with less, and our community members suffer the consequences. The drug crisis and gang infiltration of First Nations is real, and it is here. Meanwhile, Canada tells us we can't have the resources to address this crisis."
Jeff Skye, Chief of Police, Anishinabek Police Service

"IPCO was created with the idea of 'Unity for Equality', to work together to advocate for the safety needs of First Nation communities. What those communities need now is for Canada to stop delaying and start taking responsibility. How can reconciliation be achieved when Canada won't even allow these communities to have their day in Court?"
Kai Liu, Executive Director, Indigenous Police Chiefs of Ontario

"Last week, the Supreme Court sent a resounding message to Canada: fix this program and start delivering on the equitable policing guarantees of Canada's own, thirty-year-old Policy. After decades of false promises and superficial commitments to reconciliation, the Court has made clear that reform is long overdue. By continually relying on procedural tactics to delay justice, it's clear Canada hasn't heard that message."
Julian Falconer, legal counsel, IPCO

Recent Supreme Court Ruling Heralds New Era for First Nations Safety

Canada's discriminatory conduct was thrown into striking relief last week, with the Supreme Court of Canada's ("SCC") landmark judgment in the matter of *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan,* 2024 SCC 39 ("*Takuhikan*"). The Supreme Court, confronted with widespread evidence of Canada's refusal to negotiate or adequately fund First Nations policing, ruled decisively against the federal government.

The SCC decision stems from a lawsuit brought by the Quebec community of Pekuakamiulnuatsh Takuhikan. In 2017, Takuhikan sued Quebec and Canada for chronic underfunding of its police service, the Mashteuiatsh Police Service. The Quebec Court of Appeal ruled in the First Nation's favour in 2022. Quebec appealed this decision to the SCC.

The SCC *Takuhikan* decision includes several important pronouncements about the importance of equitable and adequate funding for First Nations community safety.

In describing the process of negotiation for First Nations, the Court characterized it as being like having a "knife to the throat."[1] Ruling that Canada has breached its duty to negotiate honourably, the Court observed that First Nations have been given a "false choice": either impoverish themselves to maintain a culturally responsive police service, or abolish their own service and face the unwanted return of provincial police forces.[2]

Additional Background: IPCO and the FNIPP

The FNIPP was established by Canada in 1991 as part of a national effort to address longstanding safety concerns in First Nation communities. The program is governed by the First Nations Policing Policy, which commits Canada to supporting self-government by adequately funding self-administered First Nation police services. While the Policy promises First Nations a comparable quality of policing as non-First Nation communities, the reality is that Canada's actions have never matched those lofty promises.

Indigenous Police Chiefs of Ontario ("IPCO") was founded in 2019 with a mandate to advocate for the nine self-administered First Nation police services in Ontario and the communities they serve. Combining advocacy with litigation, IPCO campaigns for a society in which all First Nations live with the same assurance of safety guaranteed to all Canadians.

IPCO's human rights complaint demands long-overdue reform of the FNIPP, which is plagued by chronic underfunding and unfair restrictions which block First Nations from basic policing services. In June 2023, IPCO earned an important victory, when Federal Court Judge Denis Gascon issued an emergency injunction order against Canada in *Indigenous Police Chiefs of Ontario v. Canada (Public Safety)*, 2023 FC 916. Justice Gascon ordered Canada to immediately reinstate funding for three First Nation police services after funding negotiations broke down, while simultaneously suspending the FNIPP's most restrictive "terms and conditions". At the time, Justice Gascon observed that IPCO had a "high likelihood"[3] of succeeding at the Tribunal.

After tireless work and advocacy, IPCO's Complaint is finally scheduled to begin on January 6, 2025, at the Canadian Human Rights Tribunal in Ottawa. However, Canada's ongoing efforts to avoid responsibility pose a real risk this entire matter could be adjourned many more months. Meanwhile, First Nations continue to suffer the consequences of Canada's discriminatory actions, just as the Supreme Court found in its recent decision.

While the *Takuhikan* decision is an important source of hope for First Nations community safety, it appears that Canada would prefer to delay justice, rather than make a meaningful effort to address the failings of its own program head-on.

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See attached "Appendix" for excerpts from the recent Supreme Court decision as well as this year's important ruling in Ontario (Attorney General) v. Restoule, 2024 SCC 27

[1] *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, at para 131.
[2] *Ibid*.
[3] *IPCO v. Public Safety Canada*, 2023 FC 916, at para 100.

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Appendix: Excerpts from recent Supreme Court Decisions

Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39

[15] Because the tripartite agreements provided for the renegotiation of their funding clauses, the Crown was required to conduct itself honourably during the renewal negotiations. **Quebec's obstinate refusal to genuinely renegotiate the contract's funding terms is not only a breach of the requirements of good faith but also a breach of the obligation to act in a manner consistent with the honour of the Crown, a principle of public law based on a higher standard** than the one relating to the obligation of good faith under private law. It bears repeating that these are two distinct bases. As I will endeavour to show, the breach of an obligation flowing from the honour of the Crown alone, independently of the breach of the requirements of good faith, justifies holding Quebec liable.

[24] Another important feature of policing in these **communities is the underfunding of Indigenous police forces, "a major, long-documented problem"** (Viens Commission, at p. 267). Underfunding compromises the quality of policing as it affects the number of police officers, their salaries, their recruitment, the equipment available to them (which may be "obsolete or simply inadequate" (p. 271)), police facilities and the services provided. In some cases, underfunding can lead to a situation that "endangers personal safety" (p. 271). This observation is made even more forcefully in a 2010 report, quoted by the Court of Appeal, which stated that [translation] "the safety of First Nations is compromised by a lack of resources in all respects: human, financial, material" (2022 QCCA 1699, at para. 115, quoting N. Bergeron, *L'autodétermination des services de police des Premières Nations au Québec: Rapport préliminaire* (2010), at pp. 58-59).

[119] With regard to the decision itself**, I begin by reiterating that the governments of Canada and Quebec knew, from year to year, that the Indigenous police force was underfunded. As will be seen below, Pekuakamiulnuatsh Takuhikan clearly communicated its funding needs to both governments at the time of each renewal.** The governments also knew that the funding problems did not result from its mismanagement of police services. Moreover, they knew, at least through the inquiry reports, that the maintenance of the police force, one of the purposes of the agreements set out in clause 1.5a), had the great advantage of providing the community of Mashteuiatsh with policing that was both culturally appropriate and not tied to the SQ's troubled past. However, Quebec chose not to terminate the agreements but to continue the contractual relationship in order to maintain the SPM, while at the same time refusing to revisit its financial contribution. That conduct disregarded the context and its counterparty's interests.

[131] In these circumstances [including chronic underfunding], as Bouchard J.A. pointed out, **Pekuakamiulnuatsh Takuhikan felt like there was a [translation] "knife to the throat"**: either it continued to impoverish itself to maintain the SPM and preserve the progress that the SPM represented in terms of self-government, or it abolished the SPM, which meant both returning to the SQ's services and suffering a setback with respect to self-government (paras. 136-37, per Bich J.A.). That situation was particularly serious given the difficulties associated with the SQ's presence in Indigenous communities. The **respondent was effectively presented "with a *false choice*", and the maintenance of the SPM depended on its acceptance of Quebec's proposals [translation] "without any possibility of negotiating", which would "further exacerbat[e] its shortfall in funding**"

[177] The honour of the Crown applies to the tripartite agreements because they concern the Indigenous right of self-government claimed by the Pekuakamiulnuatsh First Nation **in matters of public safety** in the community. The purposes of the tripartite agreements are to establish and maintain an Indigenous police force and to determine its funding. While it is true that the entire population benefits from police services, the establishment and maintenance of Indigenous police forces that are managed by the communities covered by an agreement and that provide culturally appropriate services to those communities distinguish these police forces from those serving the population in general.

[187] By this I do not mean to say that the agreement becomes a treaty like the treaties protected by s. 35 of the *Constitution Act, 1982*. **Rather, it is a matter of recognizing that the honour of the Crown requires the Crown, in negotiating and performing an agreement that has reconciliation as its backdrop, to meet a standard of conduct that is higher than in the context of an ordinary contractual relationship** (*Pallister*, at para. 56; *Witchekan Lake*, at para. 130; see also Motard and Chartrand, at p. 201).

[192] Once an agreement has been entered into**, the Crown must conduct itself with honour and integrity in performing its obligations. This means, among other things, that it must construe the terms of the agreement generously and comply with them scrupulously while avoiding any breach of them** (*Badger*, at para. 41). The Crown must act honourably in any negotiations to change or renew the agreement (see, e.g., *Gitanyow First Nation v. Canada*, 1999 CanLII 6180 (BC SC), [1999] 3 C.N.L.R. 89 (B.C.S.C.)). **It must avoid taking advantage of the imbalance in its relationship with Indigenous peoples by, for example, agreeing to renew its undertakings on terms that are more favourable to it without having genuinely negotiated first** (see F. Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020), 83 *Sask. L. Rev.* 1, at p. 20).

Ontario (Attorney General) v. Restoule, 2024 SCC 27

[1] These appeals test the Crown's commitment to reconciliation with the Anishinaabe of the upper Great Lakes after the Crown has dishonourably breached its sacred promises to them under the Robinson Treaties for almost 150 years.

[2] Today, in what can only be described as a mockery of the Crown's treaty promise to the Anishinaabe of the upper Great Lakes, the annuities are distributed to individual treaty beneficiaries by giving them $4 each

[13] At the end of the oral submissions before this Court, Ontario's counsel stated: ". . . I accept I am facing [a] 150 year history where the Crown in the broad sense has failed to engage on this, but we are here and we are listening and you are going to tell us how to approach this" (transcript, day 2, at p. 109). In the reasons that follow, **it should be clear that Ontario and Canada must act *now* to respect their treaty promises to the Anishinaabe, and to help restore the honour of the Crown and the nation-to-nation alliance that the treaties represent. Doing so will require each party, but especially the Crown, to recall the purposes behind the treaty promises.** The Robinson Treaties are not merely transactional instruments about the exchange of money for a tract of land. **They are living agreements embodying a relationship nurtured over many years before 1850 and requiring ongoing renewal into the future. It is time for the parties to return to the council fire and rekindle the perpetual relationship that the Robinson Treaties envision. Nothing less will demonstrate the Crown's commitment to reconciliation.**

[68] Treaties have long been an important means of reconciling the interests of Aboriginal and non-Aboriginal peoples in Canada. Reconciliation is aimed at building a "mutually respectful long-term relationship" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 30). It has been described as both "a first principle of Aboriginal law" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 ("*Mikisew Cree 2018*"), at para. 22) and "the grand purpose of s. 35 of the *Constitution Act, 1982*" (*Little Salmon*, at para. 10).

[70] The Crown's assertion of sovereignty over Aboriginal societies gave rise to a distinctive or *sui generis* legal relationship between the Crown and Aboriginal peoples (*Desautel*, at para. 25, citing *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 78). That distinctive legal relationship is reflected in treaties, which represent an exchange of "solemn promises" and are unique or *sui generis* agreements governed by special rules of interpretation (*Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, at pp. 404 and 410; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at pp. 1038 and 1043; *Badger*, at para. 41). **Treaties are *sui generis* because "they are the product of the special relationship between the Crown and Aboriginal peoples that is aimed at achieving reconciliation"** (P. W. Hogg and L. Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016), 72 *S.C.L.R.* (2d) 291, at p. 311).

[71] This Court has also affirmed that **in order to promote reconciliation, treaty rights must be interpreted in accordance with the honour of the Crown,** "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign" (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 65). The honour of the Crown imposes an "obligation of honourable dealing" with Aboriginal peoples (*Little Salmon*, at para. 42).

[219] As already noted, the honour of the Crown is a guiding constitutional principle that informs the interpretation of Aboriginal treaties. It also plays a crucial role in the implementation of treaties to ensure that no dishonour is brought to the government and, through this, to the Crown (*Haida Nation*, at para. 19; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 33; Henderson, at p. 887). The honour of the Crown imposes upon governments "a high standard of honourable dealing" with Indigenous peoples (*R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at p. 1109; *Manitoba Metis*, at para. 69). It is a flexible and capacious doctrine that can "measure and regulate conduct of the government in

relation to [A]boriginal peoples" (J. T. S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at p. 53).

[275] To respect their constitutional status, uphold the honour of the Crown, and advance reconciliation, Aboriginal and treaty rights can be no less enforceable than other constitutional rights (*Sparrow*, at pp. 1106-7; see also *Van der Peet*, at paras. 20-21). As the guardians of the Constitution and guarantors of constitutionally entrenched rights**, courts are responsible for ensuring that Aboriginal and treaty rights are protected by adequate, effective, and meaningful remedies** (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 155; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 753).